THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. _____

ALLAN DALE HAIFLEY, Appellant, vs. THE UNITED STATES OF AMERICA, Appellee.	PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI

UNDER RULE 23, 28 UNITED STATES CODE

THE SUPREME COURT OF THE UNITED STATES, REVISED RULES

SUBMITTED BY APPELLANT, ALLAN DALE HAIFLEY,

THROUGH HIS ATTORNEY, MILNOR H. SENIOR,

SUITE 2013, 1700 BROADWAY, DENVER, COLORADO, 80202

DATE: JANUARY 6, 1971

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A. OPINIONS

This is an appeal from an Order of the United States Tenth Circuit Court of Appeals, issued December 8, 1970, denying both a petition for rehearing and an Order on October 20, 1970, affirming the decision of the United States District Court of Colorado. The Lower Court, in a trial to the Court, found the Defendant guilty of failure to submit to induction in violation of 50 App., United States Code, Section 462(a).

The United States District Court of Colorado issued no opinion. The opinion of the Appeals Court is not yet reported.

B. STATEMENT OF GROUNDS OF JURISDICTION

The United States Supreme Court obtains jurisdiction by virtue of 28 U.S. Code, Section 1254, which states, "Courts of Appeals, Certiorari Appeal and Certified Questions. . . . Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

This is an appeal from judgments of the United States Court of Appeals, Tenth Circuit, December 8, 1970 (denying petition for rehearing), and October 20, 1970, affirming conviction of April 10, 1970, by United States District Court.

C. QUESTIONS PRESENTED FOR REVIEW

(1) Does the last clause of 32 C.F.R. Section 1625.2 (50 U.S.C.App., Section 460), which requires a specific finding of change in status "resulting from circumstances over which the Registrant had no control," deny Conscientious Objectors essential rights contained in 50 U.S.C.App., Section 456, Section 6(j), of the Selective Service Act?

(2) Did Appellant's Local Board deny the Appellant due process,

(a) In refusing to open the Appellant's classification after Appellant made claim for Conscientious Objector classification by filing SSS Form 150?

(b) By failing to notify Registrant of the true purpose of his appearance before the Board and by misleading him concerning the issues he was required to discuss?

(c) By conducting a meeting which was so prejudiced toward the Appellant and improper in technique, that Appellant could not have a fair hearing?

(3) Was the Registrant justified in refusing induction because members of the Church of Latter Day Saints receive preferential treatment in the Selective

Service System in the State of Colorado?

(4) Was Defendant entitled to an Order requiring the United States Attorney to provide materials requested in Defendant's Motion to a Bill of Particulars and Discovery and, therefore, denied a fair trial?

D. CONSTITUTIONAL PROVISIONS AND REGULATIONS

STATUTES

1. The Courts of Appeals; Certiorari; Appeal; Certified Questions. 28 United States Code, Section 1254 (1966).

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . "

2. Title: Selective Service Act of 1967, citation is 50 U.S.C.App., Section 456(j) (1968).

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

3. 5 United States Code, Section 552 (1967). Titles: Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings.

"(a) Each agency shall make available to the public information as follows: (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --- (A) Description of its central and field organization and the established places at which, the employees . . . from whom, and the methods whereby, the public may obtain information, make submittals or request, or obtain decisions; (B) Statements of the general course and methods by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) Rules of procedure, description of forms available or the places at which forms may be obtained, instructions as to the scope and contents of all papers, reports, or examinations; (D) Substantive rules of general

applicability adopted as authorized by law, and statements of general policy or interpretations or general applicability formulated and adopted by the agency; and (E) . . ."

4. 28 United States Code, Section 1361 (1962), as amended, (Supp. I, 1970). Title: Action to Compel an Officer of the United States to Perform His Duty.

"The District Court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

FEDERAL REGULATIONS

1. 32 C.F.R., Section 1625.1(c)(1907)

"The Local Board shall keep informed of the status of classified Registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the Local Board to keep currently informed concerning the status of classified Registrants."

2. 32 C.F.R., Section 1625.2(1970)

"The Local Board may reopen and consider anew the classification of a Registrant (a) upon the written request of the Registrant, . . . (b) upon its own motion if such action is based upon facts not considered when the Registrant was classified . . .; provided, in either event, the classification of a Registrant shall not be re-opened after the Local Board has mailed to such Registrant an ORDER TO REPORT FOR INDUCTION (SSS Form 252) or an ORDER TO REPORT FOR CIVILIAN WORK AND STATEMENT OF EMPLOYER (SSS Form 153) unless the Local Board first specifically finds there has been a change in the Registrant's

status resulting from circumstances over which the Registrant had no control."

3. 32 C.F.R., Section 1625.4(1970)

"When a Registrant . . ., files with the Local Board a written request to reopen and consider anew the Registrant's classification and the Local Board is of the opinion that the information accompanying such a request fails to present any facts in addition to those considered when the Registrant was classified or, even if new facts are presented, the Local Board is of the opinion that such facts, if true, would not justify a change in such Registrant's classification, it shall not reopen the Registrant's classification. In such a case, the Local Board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the Registrant's classification and shall place a copy of the letter in the Registrant's file. No other record of the receipt of such a request and the action taken thereof is required."

CONSTITUTIONAL AMENDMENTS

1. U.S. Const. amend. I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

2. U.S. Const. amend. V.

" . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . "

E. STATEMENT OF THE CASE

The Appellant was charged with failure to submit to induction into the Armed Forces of the United States in violation of Title 50, Appendix, United States Code, Section 462(a). The United States Colorado District Court took jurisdiction under Section 12 of said Act. A trial to the Court occurred on March 4, 1970. Section 12 charges the United States Attorney with the duty of prosecuting.

The Appellant, in 1966 and 1967, was a student at Texas Christian University and the University of Colorado. He was classified as 2S. In 1967 and 1968, the Appellant became active in the anti-war movement, participating in draft card burning, parades, sit-ins and various other activities, which came to the attention of his Draft Board. He was indicted as a delinquent early in 1968. This charge was later dropped.

The Appellant temporarily dropped out of school. On April 9, 1968, his Board classified him 1A. On August 28, 1968, the Appellant refused induction, was subsequently charged, tried and convicted. On June 19, 1969, Judge Doyle, of the District Court, set aside the conviction finding that the Registrant

had not been given a proper physical examination.

The Board learned on June 24, 1969, of Judge Doyle's dismissal and mailed the same afternoon an Order for Mr. Haifley to appear on July 14, 1969, for induction. On July 9, 1969, Mr. Haifley requested of the Board a Form 150, to file a Conscientious Objector claim. On July 23, 1969, the State Director postponed Mr. Haifley's induction to give the Board a chance "to consider new information supplied by the Appellant."

On July 23, 1969, the Board addressed a letter to Mr. Haifley requesting that he appear before them on July 25, 1969, "to discuss your claim as a Conscientious Objector." Following the meeting on July 25, 1969, the Secretary of the Board reported on SSS Form 119, that the Board had determined that "the information submitted on SSS Form 150 by the Registrant was insufficient to warrant a change in his classification," and also that "there had been no change in the Registrant's status due to circumstances beyond his control; therefore, the Local Board is without authority to reopen the classification."

On August 28, 1969, Mr. Haifley reported for and refused induction.

F. ARGUMENT

(1) Does the last clause of 32 C.F.R. Section 1625.2, which requires a specific finding of change in status, "resulting from circumstances over which the Registrant had no control," deny Conscientious Objectors essential rights contained in 50 U.S.C.App., Section 456(j), Section 6(j) of the Selective Service Act?

Section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C.A. App. Section 456(j), provides as follows:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." (Emphasis added.)

The statutory command is quite clear. "Nothing" in the Act is to be construed as to require a Conscientious Objector to be made subject to combatant training and service. Yet, Selective Service regulations 1625.2, 32 C.F.R.,(Section 1625.2,)entitled, "When Registrant's Classification May Be Reopened and Considered Anew," contains the following proviso which can have the effect of depriving those Registrants whose claims of conscientious objection are raised

"late" of the recognition which Section 6(j) intended them to have:

> " . . . The classification of a Registrant shall not be reopened after the Local Board has mailed to such Registrant an ORDER TO REPORT FOR INDUCTION (SSS Form 252) or an ORDER TO REPORT FOR CIVILIAN WORK AND STATEMENT OF EMPLOYER (SSS Form 153) unless the Local Board first specifically finds there has been a change in the Registrant's status resulting from circumstances over which the Registrant had no control."

This regulation, as amended, was adopted by the President, in Executive Order 10594, January 31, 1955, and according to 32 C.F.R., Section 1625, is authorized by Section 10(b)(1) of the Act which provides that:

> "The President is authorized --- (1) to prescribe the necessary rules and regulations to carry out the provisions of this Title." 50 U.S.C.A.App., Section 460(b)(1).

Our argument is relatively simple. Section 6(j) of the Act provides for an unqualified, absolute right to exemption for Conscientious Objectors. Insofar as the non-statutory regulation (Section 1625.2) would act to limit this unqualified statutory right, when applied to Conscientious Objectors who first claim their exemption after the issuance of an induction order, the regulation may not be applied lawfully.

This argument was accepted by the first Courts to hear it: United States v. Clark, 105 F.Supp.

613 (W.D.Pa., 1952); United States v. Crawford, 119 F.Supp. 729 (N.D.Cal., 1954); and United States v. Underwood, 151 F.Supp. 874 (E.D.Pa., 1955). All protected the statutory rights of Conscientious Objectors against attempted infringements by the exercise of non-statutory regulations.

In Underwood, the Registrant first raised his claim of conscientious objection on the day he refused induction, July 21, 1952. He pressed his request for reopening of his classification on these grounds after the date of refusal. The Local Board, unlike the Local Board in the instant case, did not reschedule the induction order for a date after it had decided not to reopen. Indeed, it was only after Underwood was indicted that the Board notified him of their refusal to reopen. Despite Underwood's extreme tardiness in asserting his claim, the Court nevertheless held that the action of the Local Board, in refusing to consider the claim, was improper.

After quoting the unqualified language in Section 6(j) of the Selective Service Act of 1948, providing for the exemption of Conscientious Objectors (identical to the language in today's military Selective Service Act, quoted supra), the Court went

on to say:

> "It is plain that a person meeting the conditions of the above Section of the Act is not to be subjected to combatant training and service. This privilege is not to be defeated by procedural regulations. Nowhere in the Act does it provide that unless the Registrant makes his claim before the Notice of Induction, he thereafter waives his right to the privilege. Had Congress so intended, it would have set forth such intention in unmistakable terms." 151 F.Supp. at 876.

It, therefore, seems clear that the language of Section 6(j) unconditional and unqualified is in conflict with Section 1625.2 and therefore not authorized by statute and invalid as applied to Conscientious Objectors.

Moreover, in Miller v. United States, 388 F.2d. 973, 1SSLR, 3014 (CA 9, 1967), the Court of Appeals found that the State Director's request that the Local Board consider a Registrant's post-induction order Conscientious Objector claim, relieves the Board of the requirements of regulation 1625.2.

The improper conduct, or omitted interview, deprives the Registrant of a "meaningful appeal," if an appeal becomes necessary.

See Estep v. United States, 327 U.S. 114; Gonzales v. United States, 348 U.S. 407; United States v. Pervus, F.2d. 1 SSLR 3228 (CA 2, 1968), citing

United States v. Nugent, 346 U.S. 1 (1953).

In the Appellant's case, he was cut off from appeal on tenuous grounds, as in United States v. Main, 417 F.2d. 951, (Tenth Circuit, 1969).

Appellant notes in comparing the instant case with Senior Circuit Judge Fahy's dissent in United States v. Main, that the Appellant submitted evidence that indicated that he had convictions of conscientious objection which crystallized prior to the date of his induction order, and that he failed to press his claim because of a misunderstanding about his physical eligibility for military service.

The parallel in the instant case is that Mr. Haifley never had a clear understanding of conscientious objector requirements under the Selective Service and was under a misunderstanding concerning his eligibility. Further, Mr. Haifley was under indictment earlier and a request for reclassification would be meaningless. Also, note the haste of the Board in processing Appellant.

Appellant agrees with Senior Judge Fahy when he states in his dissent that the Board misconceived its authority under the regulation. The two cases are also similar because neither Appellant

indicated by any communication to his Local Board when his convictions matured, nor is there any independent objective evidence on the subject.

In rejecting the Keene case (Keene v. United States, 266 F.2d. 387, Tenth Circuit, 1969) as controlling, the dissent further states, "That the Local Board gave no consideration to the time when the Appellant's Conscientious Objector convictions matured, and because it is possible that had they done so they might have been persuaded that his claims were in fact timely." It is noted that Mr. Haifley never was asked when his Conscientious Objector beliefs crystallized, nor was he asked if his beliefs had changed since he filed Conscientious Objector Form 150.

On page 48, lines 16 through 18 of the Record on Appeal, United States Court of Appeals, Tenth Circuit, the Clerk of the Local Board stated that Mr. Haifley was not asked this question in his personal appearance:

"Q. Now, was any question asked of Mr. Haifley when he reached this opinion or this belief?

A. Not to my knowledge."

Page 58, lines 18 through 25 of the Record on Appeal:

"THE COURT: He said he was opposed to war.

THE WITNESS: Right.

THE COURT: Did he say how long he had been opposed to war?

THE WITNESS: No, sir.

THE COURT: Was he asked about it, how long he had felt that way?

THE WITNESS: No, sir, he wasn't."

In Footnote #4, the dissent quotes United States v. Stafford, 389 F.2d. 215 (Cir., 1968), where the Court remanded as in United States v. Gearey, 368 F.2d. 144 (Second Circuit, 1966), but held that, "If it were determined that the Local Board rejected the Registrant's claim as untimely, the indictment must be dismissed until the Local Board makes a decision on legally sufficient grounds."

(2) Did Appellant's Local Board deny the Appellant due process,

(a) In refusing to open Appellant's classification after Appellant made claim for conscientious objector classification by filing Conscientious Objector Form 150?

The denial of access of Conscientious Objector status, imposed upon Registrant by the Draft Board's refusal to reopen classification, cut off rights of appeal, a basic right of procedural fairness constitutionally required. The decision not to reopen is the final determination of the Registrant's application for Conscientious Objector status, for he is not allowed to proceed any further. It is not appropriate to deprive the Registrant of procedural safeguards at this critical stage of the proceedings. United States v. Weller, 309 F.Supp. 50 (N.D.Cal., 1969) No. 42614, 2 SSLR 3229, prob. juris, noted _____ U.S. _____, March 23, 1970, page 24.

Selective Service regulations do not provide for appeals from a refusal to reopen within the administrative system. (32 C.F.R. pt. 1626, especially Section 1626.2(a) allows appeals only of "classification." Hershey, Legal Aspects of Selective Service

(1969), at 36, states clearly that there is no appeal from the decision refusing to reopen.) Nor may the Local Board decision be subjected to any effective judiciary review.

There will be no "record" of Local Board action to review. 32 C.F.R., Section 1625.4 contains the sole record-keeping requirement in cases of refusals to open --- the Local Board is merely required to advise the Registrant, by letter, "that the information submitted does not warrant . . . reopening . . . and (2) place a copy of the letter in the Registrant's file. No other record . . . is required."

Thus, the ex parte "hearing," coupled with the denial of any sort of review (administrative or judicial), denies Appellant due process of law.

Respondent may claim that Appellant waived his rights. Appellant submits that to apply a waiver theory herein would deprive the Registrant of access to a governmental entitlement in a manner which is unconstitutional and violates the Fifth Amendment's requirements of procedural due process.

A waiver theory, which set up a dichotomy of "rights" and "privileges" ("rights," which could not be waived, and "privileges," being mere matters

of legislative grace), has been resoundingly repudiated during this past decade. Access to governmental benefits, even those customarily (though mistakenly) denominated "privileges," may not be denied by a method or under a standard which the Bill of Rights interdicts. See Sherbert v. Verner, 374 U.S. 398 (1963); Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv.L.Rev. 1439 (1969); Linde, "Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector," 39 Wash.L.Rev. 4 (1964), 40 Wash.L.Rev. 10 (1965); O'Neil, "Unconstitutional Conditions: Welfare Benefits With Strings Attached," 54 Calif.L.Rev. 443 (1966).

Statutorily conferred Selective Service classifications are entitled to appeal protections. An improper cut-off of statutorily conferred benefits denies Appellant due process of law. Additionally, the methods employed by the Local Draft Board, in determining that the cut-off provisions of the regulation are to be applied (i.e., when they make a finding of no "change in circumstances . . ."), are devoid of any of the customary procedural safeguards. The Local Board "hearing" (if any) is ex parte, without provision for notice and a right to be heard.

In sum, the waiver theory may not be applied here because: (1) Gutknecht, United States v. Gutknecht, 90 Sup.Ct. 506, 24 L.E.d. 532, vitiates the "privilege theory" of classifications which underpins the Schoebel waiver theory (United States v. Schoebel, 201 F.2d. 31 Seventh Circuit, 1953); (2) it is not applicable without a showing of knowledge, disclosure, and fairness; and (3) access to the "right" or "privilege" (exemption from combatant service as a Conscientious Objector) is severely restricted by procedures which are violative of the due process clause.

(b) By failing to notify Registrant of the true purpose of his appearance before the Board and by misleading him concerning the issue?

The appearance before the Board was initiated by the Board after receiving Mr. Haifley's Conscientious Objector Form 150. The meeting was called to investigate Mr. Haifley's claim and was designed to suit the requirements of the Board which determined where, when, and how the meeting was to be held; those who were to be present; and the subject matter to be discussed. Furthermore, a member of the Board would act as chairman.

The Board, having undertaken to inform the Registrant, had a duty to fully disclose to him the

nature of the proceeding, the requirements he must meet, and the possible results. Appellant believes that he was entitled to advance notice, but if he was not, then he was certainly entitled as a minimum of procedural fairness to have these basic facts disclosed during the course of the hearing. The Board failed in this duty to Mr. Haifley.

32 C.F.R. 1625.1 CLASSIFICATION NOT PERMANENT (C) states, "The Local Board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the Local Board to keep currently informed concerning the status of classified registrants."

The Board, therefore, had a duty to investigate and to keep informed. Since the Board acted on this duty, Appellant believes that the Board had an equal duty to act in a manner which was fair to the Registrant.

Moreover, the procedure was irregular. We cite Robertson v. United States, 25099, U.S. Court of Appeals, Fifth Circuit, decided December 5, 1968,

404 F.2d. 1141, which held that:

> "Whether or not the Registrant is ultimately reclassified, the decision by the Local Board to reopen or not to reopen his classification is a separate determination of independent procedural significance. Selective Service regulations do not permit the Local Boards to evaluate the request for reclassification on its merits, until it first determines whether the information submitted by the Registrant requires reopening."

The Appellant's Board, on SSS Form 119, dated July 25, 1969, first determined that

> "The information submitted on SSS Form 150 by the Registrant was insufficient to warrant a change in his classification."

This was a judgment of the Conscientious Objector claim on its merits. The Board then found that there had been, "no change in the Registrant's status due to circumstances beyond his control," and therefore, that the Local Board was without authority to reopen the classification. The Board never ruled when Haifley reached his beliefs, nor, if Haifley's classification should be reopened. These questions were the sole issues of the meeting.

In the Robertson case supra, the Court said:

> "It is of the essence of the validity of orders of Local Boards and of the crime of disobeying them that all procedural requirements be strictly and faithfully followed, and showing a failure to follow them with strictness and fidelity will invalidate an order of the Board and conviction based thereon."

It appears that the Board itself was hazy as to the purpose of the meeting, failed to ask the proper questions, and did not inform Mr. Haifley of what would be required of him. In the United States v. Seeley, 301 F.Supp. 811 (1969), citing Lockhart v. United States, 37 Law Week 2269 (Ninth Circuit, 1968):

> "After all the Supreme Court no longer adheres to the proposition that everyone is presumed to know the law. See Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 Law Edition 2d. 228. To hold otherwise would be wholly inconsistent with the decisions of our Supreme Court which have gone so far in recent years to bring more equal justice to the young, the poor, the uneducated, the uncounseled."

In Seeley, the Court said further that the Appellant is exposed to "these severe penalities, although he did not understand the administrative remedy which he failed to evoke, and did not know the consequences of his omission, until it was beyond his power to correct it." The Court said:

> "He is punished for an omission in a complex administrative process which is nonetheless deliberately non-adversary; and which the young registrant, faced with a once-in-a-lifetime experience, is affirmatively encouraged to rely upon administrative personnel for counsel and assistance; and in which the right to be represented by an attorney is expressly denied.
>
> "The regulation 32 C.F.R., Section 1625.2, which states the Board may reopen and consider anew the classification of a registrant, has been construed to require an opening wherever

a Section 6(j) exemption is the basis for the request and the registrant has presented a prima facie case of conscientious objector status, United States v. Gearey, 368 Fed.2d. 144 (Second Circuit, 1966). See United States v. Petrie, 407 Fed.2d. 267 (Ninth Circuit EN Banc, 1969)."

(c) By conducting a meeting which was so prejudiced toward the Appellant and improper in technique, that Appellant could not have a fair hearing?

The Local Board had for some time been opposed to the activities of Mr. Haifley. Numerous newspaper clippings were found in his file showing his public opposition to war.

On February 6, 1968, the chairman of Local Board 13 wrote a letter listing Mr. Haifley's activities to the State Director in which he concluded, "Therefore, this Local Board strongly recommends the vigorous and immediate prosecution . . ." of Mr. Haifley.

It is to be noted that the Local Board did not simply request Mr. Haifley to appear before them on July 25, 1969, but undertook to notify him of the purpose of this meeting in the sentence, "This meeting is to discuss your claim as a conscientious objector."

Actually, the purpose of the meeting was to consider facts not previously considered when the Registrant was classified 1A and which, if true, would

justify change in Registrant's classification. The basic purpose of the meeting was to determine whether or not the Registrant's classification should be reopened. After the classification was reopened, then the merits of the Registrant's Conscientious Objector claim should be considered. Mr. Haifley was not informed or aware of these basic issues.

No questions were asked of Mr. Haifley as to when he reached his Conscientious Objector opinions; however, the Board determined that conditions had not occurred recently which were beyond Mr. Haifley's control.

In the fifteen minutes allotted to him, Mr. Haifley, guided by the Board, discussed the governments of the United States and Cuba, capitalism, his employment, United States foreign policy, which seem designed to prevent him from giving the information which touched on the issues essential to his case.

Mr. Haifley was uncounseled and unrepresented at the meeting. He relied upon the Local Board to guide the course of the meeting and to elicit necessary information from him. The Board spent approximately fifteen minutes with him (page 47, line 16 of the Record), and, indeed, that afternoon considered 131 other cases in about 135 minutes. Mr. Haifley stated

that, "He was opposed to war." (Page 58, lines 18 through 19 of the Record.) This statement in itself required a reopening for investigation and consideration.

The instant case parallels closely the case of Miller v. United States, U.S. Ct. of Appeals, Ninth Circuit, December 29, 1967, 388 F.2d. 973. Miller held that, "The Local Board should not have directly proceeded without purporting to reopen, to consideration of whether registrant was entitled to Conscientious Objector classification, but should have reopened and considered classification anew and failure to do so was a denial of due process. Universal Military Training and Service Act, Section 6(j), 50 U.S.C.A.App. Sect. 456(j) 462; U.S.C.A. Const. as amended, 5."

The Board determined that it had no authority to reopen. This ruling had no basis in fact or law. In 32 C.F.R. Section 1625.3(a) states that:

> "If upon review, the Local Board members are of the opinion that the evidence supports a change of classification, authority is extended to reopen the same and consider anew."

Appellant submits that the Board was so prejudiced toward the Appellant, that basic fairness by the Board was impossible.

(3) Was the Registrant justified in refusing induction because members of the Church of Latter Day Saints receive preferential treatment in the Selective Service System in the State of Colorado?

On page 62 of the Record, Frederick Obitz stated he was Director of Selective Service in the State of Colorado and that there were deferments given to certain religious groups that belong to the Church of Latter Day Saints. On page 63, Mr. Obitz said it would be "very rare" if Mormons were not found among the Registrants of Board 13. On page 64, Mr. Obitz further testified that the deferments were granted under 4-D classifications.

Mr. Obitz, on page 66, testified that 4-D classification was given for the period of two years. Further, that after they came back from their two-year deferment, they were entitled to go to college and to get by law a 2-S until age 24. Such preferential treatment constitutes denial of equal protection, due process, and is violative of the First Amendment of the Federal Constitution.

The Congress has declared that in a free society the obligation and privileges of serving in the Armed Forces should be shared generally and in accordance

with a system of selection which is fair and just. The Military Selective Service Act provides in Section 4(a) and in Section 5 that selection shall be in an impartial manner. Further, in Section 6(g) a minister is defined as "regular or duly ordained ministers and students" and in Section 16(g) a minister is described as one having regular vocation and regular employment. There is no indication that a Registrant is entitled to deferment who is temporarily employed on a mission of a church.

When members of the Church of Latter Day Saints are classified improperly as ministers, and therefore deferred, the Registrant will be taken out of order and called earlier for induction. Appellant submits that this is an improper application of the law denying him fair and equal treatment, and he is justified in refusing induction.

(4) Was Defendant entitled to an Order requiring the United States Attorney to provide materials requested in Defendant's Motion to a Bill of Particulars and Discovery and, therefore, denied a fair trial?

The Record shows that the Court partially granted Defendant's Motion for a Bill of Particulars; however, in effect, Defendant's Motion for a Bill of Particulars was in actuality denied in most part.

Failure to grant a Court Order in discovery as requested by the Defendant caused the Defendant to be unprepared in the face of a public agency exercising great power over an individual, by withholding simple factual information which would enable the Defendant to determine if the agency is so constituted as to make its acts lawful.

A denial of the classification records, the records pertaining to Order of Call, and records of the Board's meetings have precluded Defendant from proving what he suspects to be prejudicial, arbitrary and illegal acts by the Board. That the Appellant has a right to this information is based on the Public INformation Section of the Administrative Procedure Act 81 Stat. 54,5 U.S.C., Section 552, and the provision of Section 1361 of Title 28 U.S.C. Appellant also

relies on Martin vs. Neuschel, Civil Action No. 68-301 (E.D.Pa.), February 13, 1968. In Martin, the Court said:

> "It is beyond me to believe that any citizen of the United States, particularly a registrant, can't know the address of a member of the Board and why this high and mighty, whoever he is, Selective Service state man, or General Hershey or somebody else can willy-nilly say 'we will give it to you when we are ready to.'"

The Defendant's Motion for a Bill of Particulars is found on page 9 of the Record. Among items which the Defendant felt were of particular importance were Colorado State Director's Notice of Call on Local Board 13, which is Paragraph 1-s, the classification records of Selective Service Local Board 13, copies of minutes of meetings, information relevant to the number of Colorado registrants classified and their classification, on or about the date of the mailing by Colorado Selective Service Board 13 of Defendant's Order to Report for Induction, the names and ages of registrants selected for induction in June, 1969, copies of Colorado Selective Service Appeal Board docket book, and names and ages of all Mormon missionaries deferred during 1968 and 1969.

The government in its prosecution did not state the basis for the Order of Call of Mr. Hadfley, did not prove by written material that the Order of Call

was proper nor that the selection of Mr. Haifley for induction was fair and equitable. The burden fell upon the Defendant to prove his Call was improper and without the discovery proceedings as reflected in Motion for a Bill of Particulars, the Defendant was unable in these areas to offer a proper and complete defense.

G. CONCLUSION

For the foregoing reasons, the Appellant requests that his conviction be set aside, that the case be remanded to the District Court, and that the Local Board #13, Englewood, Colorado, be ordered to make a legal and proper determination by virtue of a hearing before the Board, at which time the Appellant would have opportunity to address himself to the issues and the Board could make a ruling as to whether or not the Appe lant's classification should be reopened.

Respectfully submitted,

MILNOR H. SENIOR
Attorney for Appellant
Suite 2013, 1700 Broadway
Denver, Colorado 80202
Phone: Area Code 303, 892-7021

CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing Notion to Dispense With Printing of Petitioner's Petition for Writ of Certiorari and Petition for Writ of Certiorari was served upon the Attorney for the Respondent by mailing a true copy thereof, postage prepaid, addressed to the Solicitor General of the United States, Washington, D.C. 20530 this 5th day of January, 1971.

United States District Court

FOR THE

DISTRICT OF COLORADO

FILED
United States District Court
Denver, Colorado
APR 27 1970
G. WALTER BOWMAN
Clerk
Dep. Clerk

United States of America

v.

ALAN DALE RAFFLEY

No. 69-CR-377

On this 10th day of April, 1970 came the attorney for the government and the defendant appeared in person and by counsel

It Is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty, has been convicted of the offense of failure to submit to induction, in violation of 50 App., United States Code, Section 462(a),

as charged in the Indictment returned 12-4-69, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted. The Court finds the defendant is a youth offender within the terms of Title 18, United States Code, Sec. 5005, et seq.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for ~~xxxxxxxxxx~~ treatment and supervision for an indeterminate period of time in lieu of a definite term of imprisonment pursuant to the Federal Youth Corrections Act, Title 18, United States Code, Section 5010(b), until discharged by the Federal Youth Corrections Division of the United States Board of Parole, as provided in Section 5017(c) of Title 18, United States Code.

It Is Adjudged that

ENTERED
ON THE DOCKET
APR 27 1970
G. WALTER BOWMAN
Clerk
By ..... CLERK
DEP. CLERK

I, the undersigned, Clerk of the United States District Court for the District of Colorado, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.
WITNESS my hand and SEAL of said Court this 27th day of April, 1970
G. WALTER BOWMAN, Clerk
By ..... Deputy

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

It Is Adjudged that the defendant upon his plea of [1] not guilty and a verdict of guilty, has been convicted of the offense of failure to submit to induction, in violation of 50 App., United States Code, Section 462(a),

as charged in the Indictment returned 12-4-69,
and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

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It Is Adjudged that [2]

ENTERED
ON THE DOCKET
APR 27 1970
G. WALTER BOWMAN
CLERK
BY ..... DEP. CLERK

I, the undersigned, Clerk of the United States District Court for the District of Colorado, do certify that the foregoing is a true copy of an original document remaining on file and of record in my office.
WITNESS my hand and SEAL of said Court this 27 day of April, 1970.
G. WALTER BOWMAN, Clerk
By Gloria Rankin
Deputy

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William E. Doyle
United States District Judge.

The Court recommends commitment to [4]

.....
Clerk.

[1] Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number ..... " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court to recommend a particular institution.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1204

ALAN DALE HAIFLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 432 F. 2d 1064.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1970. A petition for rehearing was denied on December 8, 1970. On January 6, 1971 the petition for a writ of certiorari was filed. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's local board properly denied his claim to conscientious objector status, first made after he had been ordered to report for induction.

2. Whether the local board erred in refusing to reopen petitioner's 1-A classification at the same time it denied his conscientious objector claim.

3. Whether petitioner was accorded a fair and impartial hearing at his personal appearance before his local board.

4. Whether the granting of a ministerial (IV-D) deferment for a two-year period to those registrants qualifying under 32 CFR 1622.43 unfairly accelerated petitioner's order of call to induction.

STATEMENT

After a non-jury trial in the United States District Court for the District of Colorado, petitioner was convicted of refusing to submit to induction, in violation of 50 U.S.C. App. 462(a). On April 10, 1970 he was sentenced to an indeterminate sentence under the Youth Corrections Act. The court of appeals affirmed (Pet. App.).

Petitioner, born in 1947, registered with his local board in Englewood, Colorado, and was initially given a student (II-S) deferment. In April 1968,

after he left college, he was classified I-A (Tr. 14).[1] He appealed and the appeal board unanimously affirmed the classification (Tr. 17-18);[2] petitioner was ordered to report for induction in August 1968 (Tr. 27-28). On the scheduled date, he reported but refused to submit to induction. In June 1969, he was convicted under 50 U.S.C. App. 462(a), but on motions for new trial and arrest of judgment, the trial court set aside the conviction because petitioner had been improperly processed at the induction station (Tr. 35-36; SS File 51); the court expressly stated, however, that its action was without prejudice to further processing of petitioner by Selective Service officials (SS File 51c).

The State Director, on receiving the court's dismissal order, advised the local board to treat petitioner "like any other registrant of his age and with his classification" (Tr. 36, 67-68; SS File 52). Since his I-A classification had not been affected by the court order, the clerk of his local board, pursuant to the authorization given her to perform ministerial functions (Tr. 23-24), included petitioner in the group of registrants being ordered to report for induction on July 24, 1969 (Tr. 23-24, 36, 41, SS

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[1] "Tr." refers to the one volume trial transcript. "SS File" refers to petitioner's Selective Service file, admitted as an exhibit at trial. We are presently lodging both transcript and file with the Clerk of this Court.

[2] The basis for this appeal is not known (Tr. 17, SS File 70), but it clearly was not due to any conscientious objector claim (Tr. 19).

File 53-56).[4] After receipt of this induction notice, petitioner requested SSS Form 150, the Selective Service questionnaire furnished to registrants seeking to claim conscientious objector status (Tr. 42-44, SS File 57). His scheduled induction was thus postponed (Tr. 45, SS File 62, 63).

Petitioner signed the questionnaire and returned it otherwise uncompleted (SS File 58). In a separate letter (SS File 58a-58b), he stated his reasons for not using SSS Form 150 and set forth his beliefs in some detail. Briefly, petitioner stated that the form was inapplicable to him because he allegedly could neither serve as a non-combatant (Statement A of SSS Form 150) nor perform alternative civilian service in lieu of induction (Statement B of SSS Form 150). He described his conscientious objector beliefs in the following terms:

> * * * I support and would participate in those wars of national liberation such as the one in Vietnam or in the United States * * *, I consider myself a selective CO.

It was in high school, he wrote, that he first gained awareness of the true nature and history of the United States and began to understand its historic racism and violence. His college experiences and membership "in the Resistance and Students for a Democratic Society" had, he stated, solidified his opposition to institutions such as the armed forces of the United States which destroy that which is decent and creative. He claimed to have been outspoken in

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[4] Petitioner was not a delinquent registrant (Tr. 25).

his opposition "concerning the draft at countless meetings, rallies, demonstrations and other events in Colorado in the past 18 months" (SS File 58a-58b).

On July 23, 1969, the local board requested that petitioner personally appear before it to discuss his claim (Tr. 45-46, SS File 61). Before meeting with him on the 25th, the board reviewed his file (Tr. 46); the scheduled meeting lasted approximately fifteen minutes (Tr. 47). Petitioner told the board that his opposition to war was not religious (Tr. 48-50); that he was not entirely in agreement with the United States form of government; and that he was a "Selective Conscientious Objector, because of the war in Viet Nam, our foreign policy and other reasons" (SS File 64). He revealed, however, that he was then employed by Ace Box Co., which made "boxes to ship ammunition to Viet Nam" (SS File 64).

The board determined that the information submitted did not warrant a change in classification (SS File 64) and would not have even if an induction notice had not been mailed to petitioner prior to the filing of his claim. Moreover, since there was no evidence of a change in petitioner's status due to a circumstance beyond his control, the board concluded that it was without authority to reopen his classification in the post-notice situation presented (SS File 64).

Petitioner was again ordered to report for induction (SS File 65). On August 14, 1969, he reported and was found acceptable but refused to submit to induction (Tr. 82-83, SS File 67).

At trial, petitioner testified that it was after receipt of his 1969 induction order that he first requested SSS Form 150 (Tr. 70), and that he had been motivated to do so because of a decision in a Selective Service case in Boston in March 1969 (Tr. 85); he stated that he then "began to reconsider filing [a conscientious objector claim] with the Board just to see what would happen" (Tr. 71, 85). He told the court he was not a pacifist but was "conscientiously opposed to what they're doing in places like Vietnam" (Tr. 71-72), and indicated a willingness to perform "C.O. type work" (Tr. 76). Petitioner stated that he had held these views for some months prior to the receipt of the 1969 induction notice and added that the local board should have known this from his publicized actions in working against the operation of the draft (Tr. 21, 81-83, 85).

ARGUMENT

1. There was a plain basis in fact for the action taken by petitioner's local board. It is undisputed that petitioner's conscientious objection is directed solely to the war in Vietnam, and not to participation in war in any form (SS File 58a, 64). There is every indication that his views, whatever they may be, are not derived from "religious training and belief," even as that phrase has recently been interpreted by this Court in *Welsh* v. *United States*, 398 U.S. 333 (Tr. 48-50), but rest "solely upon considerations of policy, pragmatism, or expediency" (398 U.S. at 342-343). Thus, the claim does not even fall within the selective conscientious objector concept

presented to this Court in *Gillette* v. *United States*, No. 35, this Term. Moreover, the board could properly consider petitioner's employment at the Ace Box Co. (SS File 64) as casting doubt on the sincerity of his claim.

2. Both parties agree that the local board carefully considered petitioner's claim, even according him a personal interview before denying the conscientious objector classification. Thus, the question relating to post-notice claims now before the Court in *Ehlert* v. *United States*, No. 120, this Term, is not involved in this case. Even so, petitioner contends that the board erred in failing to reopen his 1-A classification—thereby foreclosing the opportunity to take an administrative appeal—*prior* to acting on his post-notice claim. However, this argument overlooks the plain language of the Selective Service reopening regulation (32 CFR 1625.2), which expressly prohibits a local board from reopening in the post-notice situation unless it "first specifically finds" a change in the registrant's status due to circumstances over which he had no control. Consequently, the pre-notice rationale of *Mulloy* v. *United States*, 398 U.S. 410—that a reopening under 32 CFR 1625.2 is required on presentation of a *prima facie* claim—has no application once the order to report for induction is mailed. See our petition for a writ of certiorari in *Laird* v. *Capobianco*, No. 611, this Term, pp. 7-9;[*] *Passel* v. *Laird*, 420 F. 2d

[*] We are providing petitioner's counsel with a copy of this petition.

1169 (C.A. 2). Nevertheless, we point out that, even if the *Mulloy* rationale were applicable here, the refusal by the board to reopen would be entirely correct, for petitioner has failed to meet even the most minimal requirement of stating a *prima facie* claim.

3. The contention that the personal appearance before the local board was conducted unfairly is without merit. Petitioner was apprised of the nature and purpose of the meeting (SS File 61), and the discussion he had with the board members was fully consistent with the stated objective for his appearance (SS File 64). Even assuming, as petitioner contends, (Pet. 28), that the board's questions did not focus on the time sequence indicating when petitioner's beliefs actually matured, we point out that on the facts of this case such questioning was not necessary. Even under the rationale of *United States* v. *Gearey*, 368 F. 2d 144 (C.A. 2)—a decision which we believe is incorrect (see our brief in *Ehlert* v. *United States*, No. 120, this Term) but which the Tenth Circuit has recently followed[6]—reopening on the basis of a post-notice conscientious objector claim can occur only if the local board first finds "that the applicant's beliefs ripened only after he received his notice, *and* that his beliefs qualify him for classification as a conscientious objector (368 F. 2d at 150; emphasis supplied). Since the latter requirement in this case clearly had not been met, there

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[6] *United States ex rel. Brown* v. *Resor*, C.A. 10, No. 74-70, decided July 21, 1970.

was no need to question petitioner on the former point.[6]

There is, moreover, absolutely no evidence that the board acted out of a bias against petitioner (Pet. 27-29). Indeed, in 1967, after petitioner destroyed his draft card, his local board had specifically recommended that his induction not be accelerated (Tr. 68). Nor was his induction accelerated in 1969, when he was ordered to report for the second time (Tr. 67).

4. Petitioner, at trial, called the State Director of Selective Service to testify as to the practice in the State of Colorado of deferring for two years members of the Latter Day Saints who qualify for a ministerial (IV-D) classification (Tr. 62-66). See 32 CFR 1622.43. Petitioner contends that this practice is unfair as to him in that it results in the earlier call-up of registrants who are not members of the Latter Day Saints. This is a speculative argument and petitioner lacks standing to raise it in these proceedings, since he has not sought similar deferred status and had his claim denied because he was not a member of his religious group. *Cf. Breen* v. *Selective Service Board*, 396 U.S. 460.

Even assuming standing, however, the argument has no merit. The state director testified that the deferment is assigned only to registrants who have demonstrated that they "are ordained, and * * * are

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[6] Moreover, petitioner's testimony at trial made clear that his views were established well before the order to report.

full time" (Tr. 66), as required by 32 CFR 1622.43 (Tr. 64). The fact that there are a number of Mormons in Colorado able to make such a showing in no way suggests that members of other religious groups residing in that state cannot obtain the same deferment on submission of similar proof. Certainly, the effect of awarding qualified registrants a IV-D deferment—or, for that matter, any other deferment —will be an earlier call-up for those who, like petitioner, cannot demonstrate that they are entitled to any deferment or exemption. But this does not suggest unwarranted preferential treatment; those receiving deferments are reclassified 1-A on the expiration of their deferred status.'

'The additional argument by petitioner relating to his motion for a bill of particulars (Pet. 32-33) was properly disposed of below (Pet. App. 6). Petitioner made no showing at trial of lack of compliance with the order partially granting his motion; nor did he raise any objection to that order. At trial, he called the Colorado State Director and questioned him both as to the general policy for granting IV-D deferments in that state, and as to the processing by Selective Service of his own claim; there was nothing to suggest, even inferentially, that petitioner's order of call was improper. On the contrary, the state director testified that petitioner's 1969 induction had not been accelerated. There is thus no cause for ordering production of additional documents sought by petitioner.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

FEBRUARY 1971.

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